

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>SKY LIQUOR, INC.</b>	:	DETERMINATION DTA NO. 823935
for Revision of Determinations or for Refund of	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period December 1, 2005 through	:	
February 28, 2009.	:	

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Petitioner, Sky Liquor, Inc., filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 2005 through February 28, 2009.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at 1384 Broadway, New York, New York, on June 17, 2012 at 10:30 A.M., with all briefs to be submitted by September 30, 2012, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by its president, Wengui Li. The Division of Taxation appeared by Amanda Hiller, Esq. (Michael B. Infantino, Esq., of counsel).

***ISSUE***

Whether the Division of Taxation properly assessed petitioner, as the bulk sale purchaser of a retail liquor store, for the sales tax liability owed by the seller at the time of the sale.

### ***FINDINGS OF FACT***

1. Petitioner, Sky Liquor, Inc., operates a retail liquor store known as Bayside Liquor located in Bayside, New York. Petitioner purchased Bayside Liquor from its prior owner Joo Hwan Ko.

2. In connection with its purchase of Bayside Liquor, petitioner filed a Notification of Sale, Transfer, or Assignment in Bulk (Notification) with the Division of Taxation (Division). The Notification indicates May 29, 2009 as the date of the sale. The envelope in which the Notification was mailed is addressed to the Division's "Bulk Sales Unit, COAB," and bears a Pitney Bowes machine metered mailing date stamp of June 4, 2009. The Notification and the envelope in which it was mailed each bear a date stamp indicating receipt thereafter by the Division on June 8, 2009.

3. The Notification lists the assets sold to petitioner as tangible personal property (furniture, fixtures, etc.), merchandise inventory for resale, and intangible property (goodwill, etc.), and allocates the selling prices as \$1,200.00, \$31,000.00 and \$78,000.00, respectively, to these three asset groups. While the sum of these three amounts is \$110,200.00, the Notification erroneously lists the total sales price as \$80,000.00. The Notification lists \$8,000.00 as the amount of money set aside in escrow. The sum of \$100.50 was remitted to the Division with the Notification as "bulk sale tax."<sup>1</sup> Notwithstanding that the Notification states "See Attached Contract of Sale," no contract of sale was included with the Notification or filed thereafter.

4. The Division issued to petitioner a Notice of Claim to Purchaser (Notice of Claim) dated June 10, 2009, advising of a possible claim for sales and use taxes owed by the seller. This

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<sup>1</sup> This amount was calculated as sales tax due, at the rate of 8.375%, on the \$1,200.00 of tangible personal property reported transferred.

Notice of Claim directed petitioner not to distribute funds or property to the seller until the seller's liability was determined, and either payment was made or the Division authorized the release of funds or property. The Notice of Claim further advised petitioner that failure to comply with its terms would subject petitioner to liability for any sales tax liability due from the seller.

5. On August 24, 2009, the Division issued two notices of determination to petitioner assessing sales tax due in the aggregate amount of \$50,334.42 for the period spanning December 1, 2005 through February 28, 2009, as follows:

Tax	Assessment ID Number	Sales Tax Quarterly Period
\$5,878.36	L-032429326-8	12/01/05 through 02/28/06
\$44,446.06	L-032429325-9	03/01/06 through 02/28/09

6. The foregoing periods and amounts of tax set forth on the notices issued to petitioner are identical to those set forth on assessments issued by the Division against the seller, Joo Hwan Ko, based upon an audit of Mr. Ko's operation of Bayside Liquor for such periods. Petitioner's derivative liability for such amounts is premised upon its status as a bulk sale purchaser of Bayside Liquors from Mr. Ko pursuant to Tax Law § 1141(c) and § 1138(a)(3).

7. The Division's audit, initially covering the sales tax quarterly periods spanning December 1, 2005 through August 31, 2008, commenced with the issuance of an audit appointment letter to Mr. Ko (dated June 2, 2008) and to Mr. Ko's representative (dated June 30, 2008). These letters, essentially identical in content, specified that all books and records pertaining to sales and use tax liability in connection with Mr. Ko's operation of Bayside Liquors for the noted period were to be made available for review on September 26, 2008.

Accompanying each of the audit appointment letters was a Records Requested List, further

specifying that records required to be made available for review would include, among other items, sales tax returns, worksheets, cancelled checks, federal income tax returns, New York State corporation tax returns, general ledger, general journal and closing entries, sales invoices, exemption documents (pertaining to nontaxable sales), chart of accounts, fixed asset purchase and sale invoices, bank statements depreciation schedules, lease contracts, utility bills and cash register tapes. At Mr. Ko's request, the audit was to take place at Mr. Ko's representative's location in Wheaton, Maryland.

8. The initial audit period (12/1/05 through 8/31/08) was extended by the Division to include two additional sales tax quarterly periods, spanning September 1, 2008 through February 28, 2009. By a letter dated May 26, 2009, Mr. Ko and his representative were advised of this extension. The May 26, 2009 letter included a Records Requested List, specifying that the same records noted above, but pertaining to the two additional quarterly periods, were required to be made available for review.

9. In response to the Division's audit letters, Mr. Ko's representative provided bank statements, some cancelled checks and federal income tax returns. Cash register "Z" tapes (summary tapes) for 2007 and 2008 were also provided, although such tapes for the months of April through September of 2007, as well as for many other individual days during those two years, were missing. No other records, including sales invoices or cash register tapes, were furnished. The auditor was advised that Mr. Ko's sales tax returns were prepared on the basis of information telephoned by Mr. Ko to his representative. The last sales tax return filed by Mr. Ko with respect to Bayside Liquor was for the quarterly period ended August 31, 2008, although it appears that he continued to operate the business for some period of time thereafter.

10. After reviewing the limited records provided, the auditor concluded that the same were insufficient to conduct a detailed audit. The auditor's review did confirm that the amounts shown on Mr. Ko's bank statements for Bayside Liquors were in substantial agreement with the amounts reported as Bayside's sales on Schedule C of Mr. Ko's federal income tax returns. Such amounts were also in substantial agreement with the amounts set forth on the Z tapes (at least for the periods for which Z tapes were furnished). However, the auditor also determined that, for the period in issue, sales as reported on Mr. Ko's sales tax returns for Bayside Liquors were some 237% less than the amount of sales reported per Schedule C and also were less than the amount of purchases reported on Schedule C.

11. The auditor determined that the difference between sales per Schedule C versus sales per sales tax returns was \$601,008.20 for the audit period. All sales were reported as taxable sales on Mr. Ko's sales tax returns, and no exemption certificates or other documentation was supplied to support a claim that exempt sales were made. Accordingly, the auditor concluded this difference represented additional taxable sales, calculated sales tax due thereon in the amount of \$50,334.42, and assessed such amount, together with interest and penalties for fraud and for underreporting against Mr. Ko (*see* Finding of Fact 6).<sup>2</sup>

12. Petitioner, by its president, Wengui Li, offered no argument or evidence to contest the calculation or resulting dollar amounts of the assessments. Rather, petitioner maintains that the seller (Mr. Ko) is liable for the unpaid sales tax and requests that the Division pursue Mr. Ko for payment of such liability. Finally, petitioner does not dispute that it failed to file its Notification

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<sup>2</sup> The Division notes that while penalty and interest has been imposed against petitioner commencing at the time of petitioner's receipt of the subject notices, and accruing thereafter, petitioner is not derivatively liable for the penalties and interest assessed against Mr. Ko and such liability for these items has not been assessed against petitioner *Matter of Velez v. Division of Taxation of the Department of Taxation & Finance*, 152 AD2d 87, 547 NYS2d 444 [1989]; *Matter of Gaughan*, Tax Appeals Tribunal, May 14, 1992).

of Sale, Transfer or Assignment in Bulk at least ten days prior to the transfer, as required, but alleges that its attorney is responsible for this failure.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1141(c) requires the purchaser in a bulk sale transaction to give notice of such sale to the Division at least 10 days before taking possession of or making payment for the business assets. Compliance with this provision affords the purchaser protection against becoming liable for the seller's unpaid sales tax liabilities. That is, upon the timely filing of a notification of bulk sale, the Division is obligated to inform the purchaser of the existence of a possible claim for sales and use taxes owing by the seller (20 NYCRR 537.6[a][3]). Once this notice of claim is provided to the purchaser, it is then advised of the existence of such claim of taxes due from the seller and of its personal liability for such taxes to the extent of the greater of the fair market value of the assets transferred or the consideration paid (*see* 20 NYCRR 537.0[c][2]; 537.4[a][1];[c]). Thus, a purchaser may protect itself by placing the consideration to be paid for the transfer in escrow, pending resolution of the Division's claim, so as to be available in the event a liability is determined and upheld. In contrast, if the purchaser fails to file a proper and timely notice of bulk sale, then such purchaser remains personally liable for the sales and use taxes due from the seller. While this liability is limited to the greater of the purchase price or fair market value of the business assets sold, as noted, petitioner has lost the measure of protection provided by placing the consideration for the transfer in escrow and having the same available to satisfy the purchaser's derivative liability for the unpaid sales and use taxes.

B. In this case, the record is clear that the transaction between petitioner and Mr. Ko constituted a bulk sale (*see* 20 NYCRR 537.1[a][1]). It is also clear that petitioner did not comply with the notice requirements of Tax Law § 1141(c). As indicated by the Notification

filed by petitioner, the sale occurred on May 29, 2009. The envelope in which the Notification was mailed to the Division bears a machine metered date stamp of June 4, 2009, and the notification itself bears an in-date stamp indicating that it was received by the Division on June 8, 2009. Based on this evidence, the notification was clearly not filed at least ten days prior to the transfer, as mandated by the statute. By this failure to comply with the notice requirements of Tax Law § 1141(c), petitioner exposed itself to liability for sales and use taxes due from the seller.

C. Tax Law § 1141(c) requires the Division to give notice of the actual amount of taxes due from the seller to both the seller and purchaser within 90 days of the notice of bulk sale. This requirement is statutory and remains in effect whether or not the purchaser timely files the notice of sale. The evidence bears out that the Division clearly complied with this statutory requirement (*see* Findings of Fact 3, 4 and 5).

D. Given its failure to comply with the notice requirements of Tax Law § 1141(c) (*see* Conclusion of Law B), petitioner is properly liable for the tax assessed against it based on the seller's sales tax liability as assessed (*Matter of North Shore Cadillac-Oldsmobile, Inc. v. State Tax Commn.*, 13 AD3d 994 [2004], *lv denied* 5 NY3d 704 [2005]).

E. The Division has also claimed that petitioner is liable for penalty accruing from the issuance of the notices of determination, citing Tax Law § 1141(c); § 1145(a) and 20 NYCRR 537.4(e), and that petitioner has failed to show reasonable cause sufficient to support reduction or abatement of such penalty. In *Matter of Gaughan* (Tax Appeals Tribunal, May 14, 1992), penalty against a bulk sale purchaser was assessed on the notice of determination issued to the purchaser, and was sustained by the Tax Appeals Tribunal. In *Gaughan*, however, the Tribunal recognized that a bulk sale purchaser cannot be held liable for penalty or interest that accrued

against the bulk sale seller prior to the time the purchaser was notified of its derivative liability for the seller's unpaid tax (Tax Law § 1141[c]; *see Matter of Velez v. Division of Taxation*, 152 AD2d 87, 547 NYS2d 444 [1989], [where the Third Department determined that “the Legislature did not intend that a bulk sale purchaser be liable for the penalties and interest assessed against the seller” pursuant to Tax Law § 1141(c)]). Thus, the Tribunal modified the amount of the penalty assessed in *Gaughan*, in accord with the Division's concession in that case, such that the same would accrue only from the point at which the petitioner received the notice of determination (such date was deemed to be five days after the date of issuance of the notice of determination). The Division has complied with this manner of assessing penalty and interest (*see* Finding of Fact 11, Footnote 2). Petitioner, in turn, has provided no argument or evidence that would support reduction or cancellation of such penalty or interest.

F. The petition of Sky Liquor, Inc. is hereby denied and the notices of determination, dated August 24, 2009 and assessing tax in the amount of \$50,334.42 , are sustained.<sup>3</sup>

DATED: Albany, New York  
March 14, 2013

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>3</sup> The notices indicate a current amount due of \$49,334.42, thus reflecting a payment of \$1,000.00 against the amount of tax assessed for the first sales tax quarterly period in issue. In addition, the Division noted that as of the date of the hearing, the tax liability for such first quarterly period has been paid in full.